Wrongful/Negligent Referral

By Abraham B. Krieger

In this age of specialists, many lawyers refer clients and potential clients to other lawyers more experienced in a given area of law. Similarly, professionals in different fields refer to other professionals. Indeed, the referral process is a productive source of new business. However, under recent case law, referring without exercising due diligence may be actionable.

Recently, New York's Appellate Divisions in the First, Second and Third Departments, and a number of other state courts, implicitly recognized negligent recommendation/referral as a potential cause of action. While New York does not yet expressly recognize "negligent referral" or "negligent recommendation" as a cause of action, such a claim may be supported by applying the tort of negligent misrepresentation. A claim for negligent recommendation/referral may also be supported by the scope of duty voluntarily taken as part of a professional's responsibility under the rules governing professional ethics, conduct and responsibility.

Historically, most jurisdictions have only recognized claims for negligent referral in the area of medical malpractice. In New York, "[i]t is generally true that the mere referral of a patient by one physician to another, without more," is insufficient to "render the referring doctor vicariously liable" for the negligent treatment of the patient by the referred doctor.[1]

A Pennsylvania federal district court held that "negligent referral to a specialist, i.e. when the referring physician knows or has reason to know the specialist is incompetent, may be a basis for liability under general negligence principles."[2] However, the following year, a Pennsylvania state court refused to apply the same standards to the legal profession, ruling that Pennsylvania did not recognize a cause of action for negligent referral.[3]

Nevertheless, in the same opinion, the court distinguished *Tranor*, stating that "appellant did not allege in her complaint that Appellees knew [the referred to] Attorney to be incompetent."[4]

The court considered the possibility that where an attorney has actual knowledge of the referred attorney's incompetence, a cause of action for negligent referral may be recognized in Pennsylvania. In *Tormo v. Yormark*,[5] the U.S. District Court for New Jersey addressed whether a referring attorney was negligent in transferring his client's case to a criminally indicted attorney who subsequently embezzled the client's funds.[6] The court recognized a claim for negligent referral involving the lawyers, by denying the attorney defendant's summary judgment motion. By denying summary judgment, the court implicitly recognized a claim for negligent referral among lawyers. The court went on to state that a jury *could* find that the referring attorney had a responsibility to check the referred attorney's qualifications.[7]

The court stated that the referring attorney's responsibility arose from his "duties as an agent toward his [clients] and from his affirmative conduct in bringing his clients into contact with a person of previously unknown character under circumstances affording the opportunity for crime."[8]

It noted that the referring attorney, who was from New York, might not be required to know of the other attorney's indictment in New Jersey,[9] but that a jury could conclude that the referring attorney was negligent because he should have been suspicious of the other attorney's solicitation of clients in violation of the Code of Professional Responsibility.[10]

The court found that the alleged negligence selecting the attorney could be a proximate cause of plaintiff's damages and allowed the negligent referral claim to proceed.[11]

Recent New York appellate cases have questioned what was previously considered settled law that "[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring."[12]

In *Bryant v. New York*,[13] the Second Department held that where an individual voluntarily provides a recommendation or referral, that individual must perform the duty with due care.[14] *Bryant* involved defendant.

Department of Labor's recommendation of prospective employees for the claimant's business.[15] The Department of Labor advised claimant that prospective employees would be recruited, screened and interviewed by the Department.[16] The court held that the Department's screening process was voluntarily undertaken and must be performed with due care.[17] It held that such duty was performed negligently, resulting in a theft at claimant's business by an employee recommended by the Department who was previously involved in thefts, and thus warranted plaintiff's recovery of damages.[18]

Of even more concern to referring parties is the First Department's decision in *Friedman v. Anderson*,[19] denying an accountant's motion to dismiss based upon the recommendation of a financial manager. In *Friedman*, the court referred to Rule 201 of the American Institute of Certified Public Accountants (AICPA), which states that accountants "shall obtain sufficient relevant data to afford a reasonable basis for... Recommendations in relation to any professional services performed."[20] The court found that the AICPA promulgated ethical and practical rules and measures professional standards requiring accountants to "obtain sufficient data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed."[21] The court further held that by recommending the money manager to plaintiff, defendant accountants were required to perform professional services with due care.

The potential breach of that duty and damages resulting might form a "proper basis for claims of negligence and negligent representation."[22]

Notably, ethical violations by attorneys have not yet been conclusive grounds for civil liability. Under prior rules, the New York Court of Appeals held that, even if an attorney's conduct was contrary to the standards set forth in DR 9-102 (also known as, section 1200.46 of the New York Code of Professional Responsibility), "an ethical violation will not, in and of itself, create a duty that gives rise to a cause of

action that would otherwise not exist at law."23

Nevertheless, as demonstrated in *Bryant* and *Friedman*, the First and Second Departments now recognize such independent causes of action. In making referrals, an attorney must act with due care, such as has been found for accountants. 24 At the very least, an attorney should advise clients in writing that the referral is not an express endorsement or representation of actual services to be rendered and that the client must make that decision independently.

On April 1, 2009, New York joined 47 other states by adopting ABA's "Model Rules." The new rules thoroughly regulate fee splitting. Rule 1.5(g) governs fee splitting between attorneys. An attorney must advise his/her client that fees will be split, including the share each lawyer will receive. The fee cannot be excessive and must bear a relationship to services rendered and the client must give written consent and, significantly, both attorneys are jointly responsible for the work.

More jurisdictions are expanding the duties of other professions involving referrals and recommendations. Courts in Connecticut and Ohio have recognized causes of action against real estate agents for "negligently" recommending home inspection companies.

The New London Superior Court in Connecticut denied a motion to strike negligent referral as a cause of action.25 It held that plaintiff purchasers and defendant real estate agent entered into an agreement creating a relationship, obligating defendant to exercise reasonable care in its recommendations.26 The court held that where a real estate agent recommends a home inspector, "it is not an unfair burden to place on the party making the recommendation to do an appropriate investigation of the person recommended before the party makes the recommendation."

27 The court also noted that, although the Restatement of Torts § 323 concerning the failure to exercise reasonable care only allows recovery for physical harm, the cause of action is not defeated because defendant caused plaintiff's emotional and physical distress.28

Despite settled law that insurance companies are not responsible for acts of independent contractors they recommend, a claims adjuster's exaggerated recommendation can open the door to a negligent recommendation or negligent misrepresentation claim. Analogous to New York's *Bryant* case, *affirmative* referrals or recommendations can lead to liability. An Arkansas court examined whether an insurance agent who provides a list of "competent" building contractors

to an insured can charge the insurer with the duty to determine the competency and qualifications of such contractors.29 The court held that the "gratuitous undertaking to represent the competence, insured, and bonded status of contractors created a duty ...to exercise ordinary care to ensure that the information it communicated was true."30 The court remanded the case to determine whether the evidence yielded proof of a causal connection between the alleged negligent recommendation and the plaintiff's injury.31

The Illinois courts have also examined possible liability for negligent referral. An appellate court held that the Chicago Bar Association (CBA) was not liable for negligent referral, but presciently detailed the potential loopholes wherein an individual attorney could be impliedly liable for negligent referral.32 Plaintiff argued that defendant (CBA) lawyer referral service acted as a "referring lawyer" under the Illinois Rules of Professional Conduct and owed plaintiff the same duty for the performance of services as the referred attorney.33

Rejecting this argument, the Court found that the CBA was not a "lawyer" subject to the provisions of the Illinois Code of Professional Responsibility and stated, "[o]nly where the referring entity is a lawyer can such a responsibility and is such a responsibility imposed."34 Thus, the *Weisblatt* court, like *Friedman* and *Tormo*, did not shut the door to using ethical violations as a basis for civil liability when one attorney negligently refers another. Furthermore, in response to plaintiff's argument that she had pled a cause of action for negligent performance of a voluntary undertaking, the court was constrained to limit recovery under such circumstances, based on case precedent and general tort recovery, to non-economic damages. 35 It stated that the exceptions to the general rule for economic loss recovery are permitted only when there is an "intimate nexus... by contractual privity or its equivalent."36

Lastly, the *Weisblatt* court considered but denied liability under a negligent misrepresentation theory. Plaintiff failing to assert a statement of false information, and the single occurrence of her recommended attorney's mishandling of her case, does "not establish a lack of expertise or experience" so as to make the CBA's representations false.37 Apparently, if plaintiff actually alleged that the CBA told her the attorney recommended actually lacked expertise" (contrary to CBA's representations) or was deemed incompetent on other legal malpractice matters, her cause of action for negligent misrepresentation might have been recognized.

The case of *Aiello v. Adar38* suggests that a cause of action for 22 NYSBA N.Y. Real *Property Law Journal I* Summer 2010 1 Vol. 38 1 No. 3 "negligent referral" exists in a feesharing agreement. In *Aiello*, plaintiffs retained the services of attorney Issler to assert medical malpractice claims.39 After preparing the claims, Issler referred the case to attorney Starr, pursuant to a written fee sharing agreement.40 The attorneys agreed to share 50% of the contingency fee.41 Starr was to have "primary responsibility," but Issler agreed to remain the attorney on record.42 A fee dispute arose between Issler and Starr when Starr filed a petition to prevent Issler from recovering the agreed 50%. Starr argued that he performed 96% of the work and accordingly Issler should only receive his *quantum meruit* share.43

The court found the lawyers' agreement valid because it confirmed Issler would assume responsibility of the action and in no way limited the client's rights against Issler only.44 A recent case in the New York Appellate Division Third Department suggests that a cause of action for "negligent referral" for failure to supervise applies to a law firm recommending or referring its client to another attorney to perform a portion of legal services for the client.45 Plaintiff initially retained defendant to recover her interest in a partnership against Julius Gerzof, which defendant successfully accomplished.46 However, Gerzof died a resident of Florida before judgment was satisfied.41 Defendants,

attempting to recover from the estate, sought the assistance of Florida counsel, Scott Cagan, and the law firm of Bailey. Bailey did not file a notice of claim with the Gerzof estate during the required time period and thus plaintiff was unable to recover from the estate. Plaintiff claimed, and the court agreed, that "defendant (the referring law firm) is liable for damages resulting from Bailey's failure to file the notice of claim either on the basis that defendant had a non-delegable duty to file such notice of claim or based upon defendant's negligent supervision of Bailey."48

The court explained that: [The] general rule is that "[a] firm is not ordinarily liable.. .for the acts or omissions of a lawyer outside the firm who is working with the firm lawyers as co-counsel or in a similar arrangement" (Restatement Third of Law Governing Lawyers § 58, Comment e), as such a lawyer is usually an independent agent of the client. Here, however, defendant solicited Cagan and Bailey and obtained their assistance without plaintiff's knowledge. Although plaintiff was later advised that Bailey had been retained by defendant, she had no contact with Bailey and did not enter into a retainer agreement with that firm. Defendant concedes that plaintiff completely relied on defendant to take the necessary steps to satisfy her judgment against Gerzof. Under these circumstances, defendant assumed responsibility to plaintiff for the filing of the Florida estate claim and Bailey became defendant's subagent (see Restatement Third of Law Governing Lawyers § 58, Comment e).

Therefore, defendant had a duty to supervise Bailey's actions *(see* Restatement Third Agency § 3.15; Restatement Second Agency §§ 5, 406).49

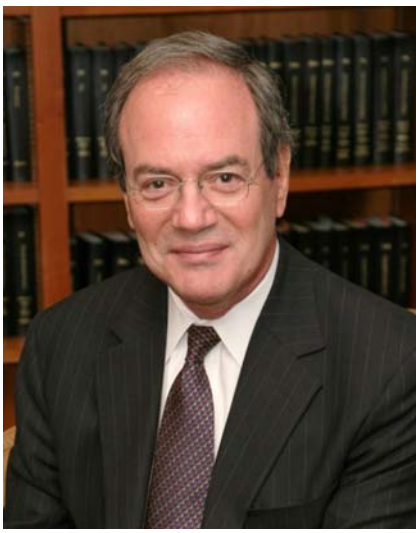
The *Whalen* decision supports the principle that law firms can be liable for failure to supervise and/or for the negligence of a referred attorney.

Conclusion

Although New York courts remain generally unsympathetic to causes of action for negligent referral or recommendation, given recent Appellate Division decisions, practitioners should be cautious and diligent with referrals and affirmative recommendations. Real estate attorneys may be responsible for referring clients to brokers, engineers or mortgage companies. Courts may hold the referring attorney liable under tort theories of negligent misrepresentation or where a duty is voluntarily undertaken, giving rise to an obligation to undertake such duty with due care. *Caveat advocatus.*

Endnotes

1. Datiz v. Shoob, 71 N.Y.2d 867, 868 (1988).
2. Estate of Tranor v. Bloomsburg Hosp., 60 F. Supp.2d. 412, 416 (M.D. Pa. 1999).
3. Bourke v. Kazaras, 746 A.2d 642 (Pa. Super Ct. 2000).
4. Id. at 644.
5. 398 F. Supp. 1159 (D.N.J. 1975).
6. Id. at 1170.
7. Id.
8. Id.
9. Id. at 1170-71.
10. Id. at 1171.
11. Id. at 1172-73.
12. Cohen v. Wales, 133 A.D.2d 94, 95, 518 N.Y.S.2d 633 (2d Dep't 1987)(In Cohen, plaintiff alleged that the board of education was negligent for recommending a former employee for a position as a grammar school teacher without disclosing that the former employee had been charged with sexual misconduct. Id. The plaintiff was injured by the teacher. Id. at 643. The court held that the common law imposes no duty to control the conduct of another or to warn those endangered by such conduct in the absence of a special relationship between either the person who threatens harmful conduct or the foreseeable victim. Id. The court concluded that no special relationship existed; rather a cause of action lies with the school district which had custody over plaintiff and hired the wrongdoer. Id. See also Bell v. Perrino, 490 N.Y.S.2d 821 (N.Y. App. Div. 2d Dept. 1985), where plaintiff was injured by a taxicab driver and sued the company that had dispatched the driver alleging the company was negligent in failing to supply, dispatch, and/or hire competent, skilled, and licensed drivers and knew or should have known that the driver was prone to violence and the use of firearms. The court held that since the company was an independent entity providing dispatching services to more than 20 cab companies in the area, it was not responsible for hiring the driver. Merely recommending the driver was insufficient to hold the company accountable for the driver's actions. Id. at 822).
13. 805 N.Y.S.2d 634 (2d Dep't 2005).
14. Id. at 636.
15. Id. at 635.
16. Id.
17. Id. at 636.
18. Id.
19. 803 N.Y.S.2d 514 (1st Dep't 2005).
20. Id. at 516.
21. Id.
22. Id.
23. Shapiro v. McNeill, 92 N.Y.2d 91, 97 (1998).
24. See Friedman.
25. Marx v. McLaughlin, 2001 WL 837921 (Conn. Super. Ct. 2001).
26. Id. at *4.
27. Id.
28. Id. at *5.
29. Capel v. Allstate Insurance Co., 77 S.W.3d 533 (Ark. Ct. App. 2002).
30. Id. at 543.
31. Id. at 542.
32. Weisblatt v. Chicago Bar Assoc., 684 N.E.2d 984 (Ill. Ct. Cl. 1997).
33. Id. at 989.
34. Id.
35. Id. at 988.
36. Id. (citing Chew v. Paul D. Meyer M.D., P.A., 527 A.2d 828, 832 (Md. Ct. Spec. App. 1987).
37. Id. at 990-91 (Plaintiffs alleged that the CBA "provid[ed] an attorney referral service by which members of the public may obtain from this service the names of attorneys with purported expertise in specified areas of law.")
38. 750. N.Y.S.2d 457 (N.Y. Sup. Ct. 2002).
39. Id. at 459.
40. Id.
41. Id.
42. Id.
43. Id. at 460.
44. Id. at 465-66.
45. Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey, 863 N.Y.S.2d 100 (3rd Dep't 2008).
46. Id. at 101.
47. Id.
48. Id.
49. Id. at 102 (internal citations in the original).



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